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IN THE

Supreme Court of the United States

October Term 1964

No. 688

In the Matter of the Estate of

LILLIAN ENG,

Deceased.

BALDO M. KRISTOVICH, Public Administrator,

Petitioner,

vs.

SHU TONG NG,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

This petition seeks to review the opinion of the District Court of Appeal, Second Appellate District, Division Three, reported in 228 Advance California Appellate 181 and 39 California Reporter 254 filed June 24, 1964; in which it was held that pursuant to Section 259 of the California Probate Code, persons residing at or near Canton, on the Chinese mainland, were not entitled to take by intestate succession property located in California and belonging to deceased residents of California.

Jurisdiction.

Jurisdiction is asserted by petition under 28 U.S.C. §1257(3).

Questions Presented.

Whether, under conditions existing today, and at the time decedent, whose estate is involved herein, died, to wit, December 5, 1962, the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China, in force on November 30, 1948 (63 Stats, at Large, 1299), compels the State of California to permit a person residing in "Communist" China, to take by intestate succession or devise from a California resident?

Statement of the Case.

Decedent, Lillian Eng, died on December 5, 1962. Except for the peculiar facts of this case, it would not be disputed that the persons entitled to take from her estate are her mother and the mother of her predeceased spouse (California Probate Code §228). However, both mothers reside on the Chinese mainland.

Respondent contends that California Probate Code §259 is valid legislation as applied to this case, and that the section prohibits these persons from taking. If respondent is correct decedent's property should pass one-half to respondent (who is the brother of the predeceased spouse) and one-half to decedent's other relatives.

No contention is made by respondent that the treaty relied on by the petitioner, if inconsistent with state law, would not control. It is also admitted that the treaty has not been formally abrogated as to territory and nationals

of the Republic of China. If the mothers resided on Taiwan (Formosa) they would certainly be entitled to take — even if California statutes were to the contrary. However, respondent submits that properly interpreted, the treaty is not inconsistent with Section 259 and does not mean that persons on the Chinese mainland are entitled to the rights guaranteed therein.

This contention is based:

(1) That, at least since July 28, 1951, the Republic of China does not exercise sovereignty over the mainland. On that date, by a note delivered to the Secretary of State, the Ambassador of the Republic of China acknowledged that the mainland was dominated by the Communists. (Treaties in Force on January 1, 1964, page 41.)

(2) That under international law, a person residing on the mainland is not a "national" of the Republic of China.

Article VIII of the aforesaid treaty guarantees succession rights to "nationals". It reads as to "real property":

> "The nationals, corporations and associations of either High Contracting Party shall be permitted to acquire, hold and dispose of real or other immovable property throughout the territories of the other High Contracting Party . . ., the treatment accorded to such nationals, corporations and associations shall not be less favorable than that accorded to nationals, corporations and associations of any third country." (Article VIII, Section 1, page 1306.)

As to "personal property" it reads:

> "The nationals, corporations and associations of either High Contracting Party shall be permitted to succeed, as heirs, legatees and donees to personal property of every kind within the territories of the other High Contracting Party, . . . and shall be permitted to take possession thereof, either by themselves or by others acting for them . . ." (Article VIII, Section 4, page 1308.)

ARGUMENT.

Contrary to the view of the petitioner, and of his attorneys, the Chinese Peoples Republic is an established and existing government. This fact may be unpleasant, but it is nevertheless a fact. Merely placing one's head in the sand and pretending that the Republic of China governs the mainland will not make the Communists disappear from that portion of the earth.

Petitioner as the Public Administrator of the County of Los Angeles, and his attorneys, have placed their heads in the sand. By so doing they fail to realize that they will actually aid the governmental entity which they "wish" did not exist. For if the appellant is correct United States dollars and other assets may easily be transferred to the Chinese Communists. There are many United States citizens of Chinese ancestry who still have close relatives residing on the Chinese mainland. These relations, should they be expressly named in a will, or should they be heirs at law of an intestate, could claim the estate funds by merely retaining counsel in one of the many nations maintaining diplomatic relations with both the Chinese People Republic and the United States, who should prosecute their claims. Though this

may not occur with assets of the Ng estate, it is not outside the realm of possibility. And it is very probable that this would occur when these circumstances arise again should the petitioner's view correct.

Neither the Government of the United States nor the Government of the Republic of China pretends that the Chinese Communist regime does not exist. This is evidenced by the aforesaid note of July 28, 1951. It is also evidenced by the Mutual Defense treaty between the Republic of China and the United States, in force on March 3, 1955 (6 UST 433). Article VI of that treaty defines the territory of the Republic of China to be "Taiwan and the Pescadores" (page 437). See also 31 CFR Sections 500.201 and 500.328 scheduling China as a "designated foreign country, but exempting areas under the control of the "recognized" government. Our non-recognition of the Communist Chinese is not a matter of doubting their existence but rather is a matter of foreign policy. Contrary to petitioner's statements on page 12 of his petition, our national government has unequivocably recognized that the Republic of China is not sovereign on the mainland.

In short, all governments, including ours, recognize as a fact that there is a well established, perhaps permanent, Communist government on the Chinese mainland. The Public Administrator cannot, whatever arguments he puts forth, change this fact.

What then is the legal status of persons residing on the mainland? Are they "nationals" of the Peoples Republic or of the Taiwan Government? If they are not nationals of the Republic of China (Taiwan Government) they are not protected by the treaty of Friendship, Commerce and Navigation.

"The term 'national' means a person owing permanent allegiance to a state." 8 U.S.C.A. §1101 (21).

In 56 Yale Law Review 58, 76 (1946) in an article by Maximillian Koessler, it is said:

> "The 'nationals' of a state are those who are under its personal sovereignty, that is, attached to it irrespective of the fact of their presence at a given moment."

Can it be said that domiciliaries of the Chinese mainland owe "permanent allegiance to" or are "attached to" the Chinese Government on Taiwan?

Respondents admit that merely because a nation's territory has been overrun by an enemy does not cause the residents of that territory to be "nationals" of the enemy nation. "Such a conquest, although the conqueror may intend to keep the conquered territory and therefore to annex it, does not confer a title so long as the war has not terminated *either through simple cessation of hostilities* or by a treaty of peace. . . . For annexation of conquered enemy territory, whether of the whole or of a part, confers a title only after a firmly established conquest and so long as war continues conquest is not firmly established." (emphasis added) (Oppenheim, International Law, a Treatise, 8th Ed., edited by H. Lauterpacht, Vol. 1, page 570.)

It is submitted that since the Communists have been in control of the mainland for fifteen years — and since active hostilities have ceased, the mainland has been "annexed" to the Communist Government. This had not yet occurred in 1949 when the situation facts considered in *Estate of Nepogodin*, 134 Cal. App. 2d 161, 285 P. 2d 672 (1955) occurred.

Oppenheim discusses the status of the persons residing in such conquered territory at page 571. It is there said:

> "As regards the national status of the subjects of the subjugated state, doctrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation becomes *ipso facto* by the subjugation subjects of the subjugating state"

At page 656, it is explained that these persons acquire "the nationality of the state which acquires the territory." This is so under the International Law, even though the local law of the conquered state considers such persons to remain "nationals" or "citizens" of their former nation (see pp. 659-660 of Oppenheim).

This is the rule applied by the courts of the United States. *United States v. Percheman,* 7 Peters 51, 32 U.S. 32 (1833) discussed the status of property and persons residing in Florida after it was ceded by Spain to the United States. It was said that "(t)he people change their allegiance, their relation to their ancient sovereign is dissolved . . ." (page 87).

The cases relied on by petitioner are not in conflict with the above analysis. *Clark v. Allen,* 331 U.S. 503 (1947) involved whether or not a 1932 treaty between the United States and Germany was terminated by the state of war existing in 1942 between the two nations. This court held that the war did not cause the treaty to be terminated without official action to that effect by our government. Even though Germany, in 1947 and since 1945, was occupied by the Allied powers, there was no annexation, official or *de facto,* of German territory by any of these powers.

Kolovrat v. Oregon, 366 U.S. 187 (1960) involved the State of Oregon's attempt to declare its laws supreme to an 1881 treaty between the United States and Serbia, which treaty, as late as 1948 was considered as being in force by both the United States and Yugoslavia. In contrast, neither the United States nor the Peoples Republic of China considers the treaty relied on by petitioner as in effect between them.

And finally, *Estate of Nepogodin,* 134 Cal. App. 2d 161 (1955) involved a situation where an active civil war was existing.

It is respectfully submitted that logic and reason compel the conclusion that a person residing for nearly fifteen years in Communist China is no longer a "national" of the Republic of China because for fifteen years active hostilities have been terminated. This is also the conclusion which is reached by the principles of International Law. The judgment of the court below is correct.

Because the doctrines involved in reaching conclusion are so firmly established it appears unnecessary that this Honorable Court reiterate them.

Therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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